United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2604

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CONCRETE PRODUCTS CORP., and GRAND PRE-STRESSED CORP.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD AFFIRMING A DECISION AND ORDER OF AN ADMINISTRATIVE LAW JUDGE.

BRIEF OF PETITIONERS, CLEARVIEW CONCRETE PIPE CORP., D/B/A CLEARVIEW CONCRETE PRODUCTS CORP., AND GRAND PRE-STRESSED CORP.

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TABLE OF CONTENTS

PAGE

Cases:

Statutes and Rules:

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Introduction

Pursuant to charges filed in Case No. 29-CA-3560 by Earl Nare (A-3)* and as amended (A-4), the General Coun-

* References to documents contained in the appendix filed herewith will be prefaced with the letter "A", followed by the page number or numbers. Petitioner also files herewith, pursuant to provisions of Rule 30(e) of the Federal Rules of Appellate Procedure, a separate volume of Exhibits, separately indexed, containing the transcript of the hearings and general counsel's Exhibit No. 2 received in evidence at the hearing. (General Counsel's Exhibit No. 1 containing 15 Exhibits separately numbered AA through OO is not reproduced inasmuch as these Exhibits appear, in material substance, in the appendix at pages A-3 through A-19). References to the transcript of the hearings will be designated "ET" followed by the page number of the transcript and in some instances the lines referred to.

sel on November 30, 1973, by the Regional Director for Region 29, issued a complaint and notice of hearing (A-5 through A-11), alleging that petitioners had violated Sections 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 29 U.S.C.A. § 151, *et seq.* hereinafter called the Act.

Hearing on the above entitled case was heard before an Administrative Law Judge on February 19, 20 and March 4, 1974 (E.T. pp. 1 through 343).

On June 14, 1974 the Administrative Law Judge issued a Decision and Order (A-20 through 39). Thereafter, petitioners herein filed exceptions to the Decision and Order of the Administrative Law Judge (A-40 through 51) with the National Labor Relations Board (hereinafter, the Board).

Thereafter, pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board delegated its authority in this proceeding to a three member panel which issued a Decision and Order on November 7, 1974 (A-52 through 53), in effect affirming the Decision and Order of the Administrative Law Judge and adopting as its Order the recommended Order of the Administrative Law Judge. It is from the Order of the National Labor Relations Board that Petitioners herein now seek review pursuant to Rule 15 of the Federal Rules of Appellate Procedure.

Statement of Issues Presented

1. John Winfield, Salvatore DiSomma, Louis Leonardi, Peter Leonardi, Earl Nare and George Bartoli were laid-off and/or discharged for cause.

2. General Counsel failed to sustain his original burden of proof that the above named employees were laid-off

and/or discharged for engaging in protected and concerted activities, while Petitioners herein sustained their burden of proof of going forward with the evidence and establishing that Winfield and DiSomma were laid-off due to lack of work due to the discontinuance of a phase of their operations, and that both Leonardis, Nare and Bartoli were thereafter discharged for insubordination and intentionally slowing down on the job.

3. During the course of the hearings, the Administrative Law Judge improperly precluded certain testimony and evidence which petitioners herein attempted to elicit from certain witnesses, which preclusion of testimony materially prejudiced petitioners' defense.

Statement of the Case

Petitioner, Clearview Concrete Pipe Corp., d/b/a Clearview Concrete Products Corp. (hereinafter Clearview) is a New York corporation which, at the time of the hearing held herein (February, March, 1974) had been engaged in the manufacture, sale and distribution of concrete pipe and related products from its plant in Deer Park, Suffolk County (A. 13), for at least eleven years (E.T. 237). Petitioner, Grand Pre-Stressed Corp., is a New York corporation which has been engaged, since approximately 1971 or 1972 (E.T. 48 & 49), in the manufacturer, sale and distribution of pre-stressed concrete products and related products, also in Deer Park, Suffolk County, State of New York (A. 13). The petitioners herein have been and still are affiliated businesses and in general operate with common offices, ownership, directors and operators and constitute a single integrated business enterprise. Directors and operators form rates and administer common labor policies affecting the employees of both respondents (E.T. 7).

Claimant, Earl Nare, was first employed by Clearview in 1967, having been an employee of Clearview for 6½ years

at the time of his discharge in August of 1973. Claimant, George Bartoli, was first employed by Clearview in 1971, having been an employee for two years and 8 months at the time of his discharge in August of 1973. Claimant, Louis Leonardi was first employed by Grand in 1971, having been employed some 2½ years at the time of his discharge in August of 1973. Claimant, John Winfield, was first employed by Clearview in 1971, having been employed just about 2 years at the time of his discharge in July of 1973. Claimant, Peter Leonardi, was first employed by Clearview in 1972, having been employed for 1 year and one month at the time of his discharge in August of 1973. Claimant, Salvatore DiSomma, was first employed by Clearview in 1972, having been employed for about one year at the time of his discharge in July of 1973.

When Earl Nare started with Clearview, he was the only maintenance man they had at that time (E.T. 47), and he remained the only maintenance man at Clearview for about four years (E.T. 48), at about which time Clearview hired some other maintenance mechanics (E.T. 50). This was about the time when they were forming Grand Pre-Stressed across the street (E.T. 48). The first man to be hired to work with Nare was George Bartoli who did some of the same work that Nare had been doing, in addition to which he also performed welding (E.T. 50). Nare and Bartoli continued to constitute the entire maintenance department for about six months (E.T. 51), at which point another maintenance man, Louis Leonardi, was hired (E.T. 51). Thereafter, for about another six months, Nare, Bartoli, and Leonardi constituted the entire maintenance department, at which point Mr. Winfield and Mr. DiSomma were hired (E.T. 51).

Several months prior to the Spring of 1973, George Russo, the corporate secretary of both Clearview and Grand, purchased a quantity of trailer-like assemblies known as "bogies." These are nothing more than a set

of eight wheels upon which a frame was to be built on top, which would support a heavy concrete member. That plus the member itself actually makes up a trailer effect (E.T. 186). The bogies were old army trailers that Clearview and Grand took apart and refabricated so that these beams could be put on to be hauled to the different jobs (E.T. 239). They were being used for delivering the product up to North River the last week in July, of 1973 (E.T. 187). The bogies were part of the handling of a job contract that Mr. Russo had negotiated, and had to be delivered by a certain date (E.T. 192). It was a job that took a few years to complete (E.T. 219). Some of the bogies were already made and just had to be converted over, but the respondents bought some other ones, war surplus, which had to be fabricated and reinforced (E.T. 58) and during June and July of 1973, the bulk of the maintenance department work was in converting these bogies to operable use (E.T. 46).

The fabrication work being done on the bogies was a type of work that petitioners' employees usually did not do (E.T. 271). Petitioners had never performed fabrication type work before (E.T. 272-273), nor has any fabrication welding been perfomed in petitioners' shops since the completion of the fabrication welding on the bogies in July of 1973 (E.T. 313, 314).

There is a difference between fabricating welding, which is performed by first class welders, and regular maintenance or wire or "tank" welding, which is normally performed by laborers (E.T. 313-315, 317-320). Since petitioners no longer perform fabricating welding, all of the maintenance welding done in the plants is being done by the laborers which was always the way it was done before (E.T. 314).

Earl Nare, the senior mechanic in this department, testified that in the beginning of the summer of 1973, or maybe way back into the Spring, or maybe April or May,

or about the end of June, the maintenance men decided they would start looking around for a bargaining agent (E.T. 29). Mr. Nare volunteered to see if he could find one, and did contact Mr. Lenny Rizzo of Local 447, District 15, International Association of Machinists. Mr. Nare further testified that Mr. Rizzo came to the back of the plant, he thought on the evening of July 6, and met with four or five members of the maintenance department in a parking lot across the street from the plant. At this meeting Rizzo said that he thought Local 138 had a contract with maintenance but that it would all come out in the wash, and Rizzo distributed cards for joining the union to the maintenance men present. Nare took some extra cards and distributed them to the men that were not present (E.T. 30-32). About a week and one-half later, Mr. Nare collected the cards and mailed them back to Lenny Rizzo (E.T. 33). On about July 16 or 17, Mr. Rizzo telephoned Mr. Nare and stated he had mailed a letter to the company asking for representation of the maintenance men.

On or about July 23rd or July 24th, 1973 (E.T. 172), petitioner Clearview received a letter dated July 30, 1973 from District No. 15, International Association of Machinists and Aerospace Workers, AFL-CIO (E.T., General Counsel's Exhibit #2), requesting recognition as collective bargaining representative for all mechanics, helpers, welders, maintenance and all service department employees.

On July 26th, 1973, employees John Winfield and Salvatore DiSomma were laid-off by Superintendent Francis, being advised that their lay-off was necessary due to lack of work.

On August 2, 1973, employees Louis Leonardi and Peter Leonardi were discharged by Superintendent Francis, who told them that things were getting slow (E.T. 286).

On August 8, 1973, employees Earl Nare and George Bartoli were discharged by Superintendent Francis who

stated that he had to let them go because of lack of work (E.T. 305).

After the lay-off/discharge of the six above named persons, a charge was initially filed on behalf of the six men by District 15 of the International Association of Machinists and Aerospace Workers, AFL-CIO. District 15 subsequently withdrew that charge (E.T. 18), and Mr. Earl Nare filed the charge on behalf of himself and the other five men (A-3 and 4).

It is the petitioners' contention that the six employees involved herein who were laid-off and/or discharged in July and August of 1973, were all well aware, in the Spring of 1973, when they began to look around for a bargaining representative, that upon completion of the fabrication of the bogies there would be the very real possibility of lay-offs because of lack of work. Accordingly, as a hedge against such circumstances, they intentionally engaged, on the eve of the completion of the fabrication work of the bogies, in union activities, which petitioners concede is a protected activity under the act, for the express purpose of trying to preclude any such lay-offs due to lack of work on the spurious grounds that such lay-offs were motivated by their engaging in protected activities. Petitioners further contend that the evidence preponderates that even though employees Louis and Peter Leonardi and employees George Bartoli and Earl Nare would have been laid off at the time they were due to lack of work, were, instead, discharged clearly for cause in that after the lay-offs of Winfield and DiSomma on July 26, 1973, these employees engaged in a slowdown of work on the job, were insubordinate and intentionally declined to perform their work properly, resulting in their being discharged for cause.

The petitioners further contend that General Counsel failed to sustain its burden of proof that the lay-offs/discharges of the six employees were improper and in violation of the act, and further, petitioners contend that their

defense was seriously prejudiced, as a matter of law, by the Administrative Law Judge's preclusion of certain testimony which petitioners' counsel properly sought to elicit during the hearings of this matter.

ARGUMENT

POINT I

John Winfield, Salvatore DiSomma, Louis Leonardi, Peter Leonardi, Earl Nare and George Bartoli, were laid-off and/or discharged for cause.

It is well settled that an employer may discharge employees because a particular business activity in which the employees were engaged is no longer operative, or because other economic conditions or circumstances necessitated the termination.

In *Neumann Bros. Paving Corp.* and *George L. Smith,* 1964 CCH NLRB ¶ 13,541, it was held that discharge of a union member was not discriminatorily motivated where it was shown that there was no work to perform because of lack of work. In that case, the trial examiners stated, "there is nothing . . . to contradict or discredit testimony that adverse business conditions militated against the company keeping two operating engineers on its payroll during the 1963-1964 winter."

It was observed that the company retained the employee who had 14 years service with the company and discharged the employee with 3½ years service, despite the latter's greater experience.

The evidence did not preponderate that discrimination was the motive for discharge.

Gladwin Industries, Inc. and Communication Workers of America, AFL-CIO, 1970 CCH NLRB ¶ 22,005, represents

a case where a particular business operation was abbreviated for economic reasons. The *Gladwin* case involved several questionable employment practices which were the subject of collective bargaining. However, with respect to the employer's closing down of its shipping department, a certain employee, Ray, was asked to take a lower paying job. Ray claimed that this proposal was tantamount to a discharge because of his union activities. The trial examiner found that Ray was not discriminatorily discharged. His union activities were no different than those of other employees. The record shows that shipping fell off, and the department was closed for economic reasons. Ray's job was abolished with it. His discharge was not unlawful, and not in violation of § 8(a)(3).

Petitioners concede that union activity cannot be the basis for a discharge. However, even in cases involving active unionists, it is lawful and proper to discharge such employees where the evidence shows that the discharge was *predominantly* motivated by economic considerations rather than union activity. *Rocky Mountain Natural Gas Co., Inc.* v. *NLRB,* 48 Labor Cases ¶ 18,720 (1964). In the latter case, it was shown that the company had effected a plan to reduce its staff of pipe fitters. Accordingly, pipefitter crews were cut back at the company's various locations. The evidence that certain union officers thereby lost their jobs by nature of their union activities, did not outweigh the evidence that the cutback was motivated by economic conditions and the selection of employees to remain in the employment of the company was also unrelated to union activities.

Similarly, in *Lehigh Portland Cement Co. and William Tolbert,* 1971 CCH NLRB ¶ 22,763, the evidence indicated that the employer reduced its clerical force as a measure to reduce costs by decreasing manpower. One employee, Tolbert, was the last employee hired and was discharged pursuant to the clerical force reduction plan. The Board adopted the trial examiner's finding that the employer had

acted only for economic reasons rather than those reasons prohibited by § 8(a)(3) of the Act.

Therefore, the law is clear, that where the employer reduces his work force because of economic reasons, or because a certain phase of his operation is being cut back or discontinued, there is no violation of § 8(a)(3) of the Act.

In the instant matter, the evidence clearly preponderates that the maintenance department at Clearview, from the time that employee Earl Nare was hired in the year of 1967, was comprised of one man, namely, Mr. Nare, up until the year 1971, when petitioner Grand began to get underway with the production of pre-stressed concrete members. At that time the maintenance department was increased through the hiring of Mr. Bartoli obviously because maintenance work now comprised two plants instead of one. Some six months later another maintenance man was added, Mr. Louis Leonardi, and thereafter the maintenance department operated for a period of some six months with only these three maintenance employees. And all of the evidence, fairly viewed, demonstrates that at approximately this point in time both petitioners became involved in contracts which required the transportation of large pre-stressed concrete members so that it was necessary to purchase the bogies, or trailer-type assemblies, which had to be rebuilt, or completely fabricated, which fabrication work had never been performed by either petitioner before, and which fabrication work involved the utilization of first class welders and mechanics which skills had theretofore not been required of maintenance employees in the kind of welding tasks previously performed by maintenance employees. The testimony is also clear that there was a deadline for the delivery of the large pre-stressed concrete members, even though the deadline was delayed for a short period. Nevertheless, the testimony in its entirety is absolutely clear that delivery could not have been met without the finalized completion of the fabrication of the bogies

and that meeting this deadline was a prime concern to management. Accordingly, the maintenance department was increased in size threefold in order to meet this deadline, which was met. Indeed, as one complaining witness succinctly testified:

> "Q. Did they start using them on the road around the end of July, 1973? A. Yes, they had an awful lot of road calls then." (E.T. 137)

Petitioners submit that the evidence clearly preponderates that the primary justification for laying off all six of the claimants herein was the discontinuance of the certain phase of their operation which involved the fabrication of the bogies when that phase was completed in the latter part of July of 1973. General Counsel did not present one scintilla of evidence in rebuttal thereof. Indeed, petitioners concede that the six claimants involved herein did engage in protected activities, but it is submitted that these activities were highly suspect in view of the point in time at which they were commenced.

Nowhere does the manifest disregard of evidence on the part of the administrative law judge appear so clearly as in the following sentence in his decision and order (A-33):

> ". . . respondents' animus is clear; and the timing of the termination significantly follows closely upon the Union's request for recognition. Certainly, there was unlawful discrimination in terminating each of the six maintenance employees while continuing Gomez and Carbone in the maintenance shop and promptly thereafter undertaking to hire new maintenance employees."

The evidence adduced at the hearings clearly demonstrates that Gomez and Carbone were not maintenance employees, but were laborers under a different collective bargaining unit than the maintenance employees. Some of their work was similar in nature and upon specific occa-

sions, such as the three months absence of Mr. Bartoli due to injuries, they were temporarily called upon to fill in in an effort to perform or try to perform some of the functions performed by the maintenance department. Moreover, upon a fair reading of the entire transcript of the testimony in this matter, it is clear that all of the six employees involved herein were aware that upon completion of the bogie fabrication project they would be faced with possible lay-offs for lack of work; and that accordingly, on the very eve of such completion, they intentionally and voluntarily commenced to engage in union activities for the express purpose of being able to claim, if and when those lay-offs later occurred, that the lay-offs were a direct result of their organization rights under § 8(a)(1) of the Act.

It is submitted that there is no clear animus on the part of the petitioners (who were respondents below) anymore than there is clear animus on the part of the six maintenance employees involved herein. (Indeed, it is noted that the administrative law judge did not cite specifically what constituted such "clear animus" on the part of the petitioners herein, nor, indeed, could he do so, since there was no evidence whatsoever of any such "clear animus".) Furthermore, the timing of District 15's request for recognition as the bargaining agent for the maintenance employees just as significantly precedes the termination of the bogie fabrication work as the alleged "timing" of the terminations significantly follows upon the union's request for recognition.

The evidence presented at the hearings in this matter clearly preponderates that complainants herein were maintenance department employees whose work during the spring and summer of 1973 was devoted almost exclusively to the fabrication of bogies used to transport the large concrete box beams. This same kind of work had been going on in the plant for over a year (E.T. 219). All the testimony clearly established that the work on the

fabrication of the bogies was concluded in the middle or end of July, 1973. It was as a result of the completion of this major fabricating and welding project that John Winfield and Salvatore DiSomma were let go at the end of July, 1973. They were let go by petitioners' supervisor, David Francis, who testified that he let them go without any discussion or consultation with any management representative of the petitioners. They were laid-off, not because of any union activities or membership, but because of lack of work due to the completion of the fabrication welding work, or heavy welding, which was not the usual kind of welding done by the maintenance department.

It is clear from the testimony that at the time of the discharge of Mr. Winfield and Mr. DiSomma on July 26, 1973, that Mr. Francis was unaware of any specific union activity (although he was aware that something was going on but didn't know what number or what local or what union (E.T. 281)), inasmuch as he was not advised by petitioners' management personnel of the letter received from District 15 (General Counsel's Exhibit 2) until July 29 or July 30, 1973.

It is submitted that the discharge of Messrs. Winfield and DiSomma was wholly proper, was predominately motivated by the economics of the business and was not clearly shown to be, by a preponderance of the evidence, related in any way to the professed union activities of John Winfield and Salvatore DiSomma. *Rocky Mountain Natural Gas Co., Inc.* v. *NLRB, supra.*

It is apparent from the testimony given on the trial of this action by witnesses produced by both General Counsel and petitioners herein, that Messrs. Leonardi, Leonardi, Bartoli and Nare, did not perform their assigned tasks after the lay-offs of Messrs. Winfield and DiSomma, in the same quantity and in the same quality as they had prior to the time Winfield and DiSomma were laid-off. The testimony of Francis and Monahan is clear, as was admitted in

the testimony of Nare, Bartoli and Louis Leonardi, that Francis repeatedly warned them to "hustle it up" and to "get going because you are losing me money", and that Nare and Bartoli on several specific occasions even acted in stark defiance of orders given to them. Bartoli on one such occasion ignored an order from Monahan and did nothing until Francis gave him "a glance" from across the room (E.T. 296-297). On another occasion Nare was sweeping the floor and whistling while the 120 machine lay idle with broken hydraulic hoses awaiting repair. Francis said said to him "you don't get paid to sweep the floor. I have laborers to do that; fix the machine, I'm losing money". Nare just looked at Francis and laughed (E.T. 264). General Counsel produced no evidence to rebut these specific examples of insubordination and "lying down on the job" except unspecific general testimony from the complaining witnesses that "Francis was always complaining about things".

It is submitted that after July 26, 1973, when Messrs. Winfield and DiSomma were laid-off, the remaining four men in the maintenance department intentionally engaged in a slowing down on the job, relatively secure in the knowledge that District 15 had already sent a letter to the company (E.T. General Counsel's Exh. #2), so that the lay-offs of Messrs. Winfield and DiSomma, as well as any future lay-offs which might occur because of the lack of work facing the maintenance department, could be challenged with the claim that the lay-offs were not really brought on by a lack of work but because of members of the maintenance department engaging in protected activities.

The testimony of the four remaining maintenance department employees that there was more work after Winfield and DiSomma were laid-off on July 26, 1973 is certainly inconclusive, but understandable inasmuch as only four recalcitrant employees were handling the work instead of six men. Suffice it to say that the evidence clearly

shows and preponderates that in the end of August, petitioners hired only two maintenance men to replace the six which had been let go, and the unrebutted testimony is that petitioners have operated to date with only two maintenance men, so that the evidence clearly preponderates that there was not sufficient work to keep a six man maintenance department employed at the petitioners' plants.

The law is clear with respect to employers' prerogatives:

> "It is the established rule that the employer may hire and fire at will so long as the action is not based upon opposition to union activities."
>
> *National Labor Relations Board* v. *West Ohio Gas Co.,* 172 F.2d 685 (6th Cir. 1949).

The employer herein acted properly in discharging the employees who were shown to be slowing down and generally uncooperative, such motive for discharge being proper. *National Labor Relations Board* v. *Sheboygan Chair,* 125 F.2d 436 (7th Cir. 1942).

In *National Labor Relations Board* v. *West Ohio Gas Co., supra,* an employee was discharged because he was "dilatory and unattentive to his work . . .". *West Ohio Gas* at 688.

There is testimony in the record, unrebutted by the General Counsel's testimony, that Messrs. Louis and Peter Leonardi and Messrs. Nare and Bartoli were insubordinate, another proper and lawful reason for discharge. *National Labor Relations Board* v. *Kopman-Woracek Shoe,* 158 F. 2d 103, 108 (8th Cir. 1946); *National Labor Relations Board* v. *Montgomery Ward,* 157 F. 2d 486 (8th Cir. 1946).

It is submitted that the lay-offs of John Winfield and Salvatore DiSomma and the discharges of Louis Leonardi, Peter Leonardi, Earl Nare and George Bartoli were proper and for cause, and not in violation of the Act.

POINT II

General counsel failed to sustain his original burden of proof that the six claimants herein were laid-off and/or discharged for engaging in protected and concerted activities, while petitioners sustained their burden of going forward with the evidence and establishing the affirmative defenses that Winfield and DiSomma were laid-off due to lack of work and that both Leonardis, Nare and Bartoli were thereafter discharged for insubordination and slowing down on the job.

The law is well settled that the general counsel has the burden of proving an unfair labor practice in the original proceedings against a respondent. *N.L.R.B.* v. *Goodyear Footwear Corp.*, 186 F. 2d 913 (7 Cir. 1951). In holding that the evidence presented by the general counsel was insufficient to support the findings of the Board that the employer engaged in unfair labor practices, the Court in *Goodyear Footwear* stated (186 F. 2d at pp. 916 and 917):

> "I. As we stated in N.L.R.B. v. Reynolds International Pen Co., 7 Cir. 162 F.2d 680, at page 690, in discussing alleged wrongful discharges: 'The Board argues the discriminatory nature of these discharges as though the burden was upon respondent to exonerate itself of the charges made against it. The burden, however, was upon the Board to prove affirmatively and by substantial evidence that (naming persons) were discharged because of union membership and activities and for the purpose of discouraging membership in the union."
>
> * * *
>
> "In other words the Board in its decision, starts out by assuming that the respondent company has the burden of disproving the charge. In the Board's opin-

> ion, any evidence it offers in denial must be corroborated. The law, of course, is otherwise. The burden was on the Board to prove the charge made by substantial evidence. N.L.R.B. v. Reynolds Co. 7 Cir., 162 F.2d 680."

See also *N.L.R.B.* v. *Mastro Plastics, et al.*, 354 F.2d 170, 175 (2 Cir. 1965), cert. denied 384 U.S. 972 (1966).

The petitioners assert, and it is submitted that the evidence clearly preponderates, that the sum total of general counsel's evidence to support the charge that the six claimants were discharged for engaging in protected and concerted activities amounts to the fact that after the company had received the letter from District 15 (E.T. general counsel's Ex. # 2), they or some of them were questioned about their union activities by Francis. Such testimony hardly constitutes evidence of "threats". Moreover, petitioners met the burden of going forward with the evidence and showing that the lay-offs of Winfield and DiSomma were occasioned because of lack of work, and that thereafter Messrs. Louis Leonardi, Peter Leonardi, Earl Nare and George Bartoli were discharged for insubordination and slowing down on the job. Most importantly, however, petitioners demonstrated by a clear preponderance of evidence, which remains unrebutted in any way, shape or form by general counsel, that upon completion of the special project of the fabrication of the bogies needed to transport the pre-stressed box beams pursuant to a contract entered into by the petitioners, there no longer was a need of such a large maintenance department, that it had become a department of six men at least partly because of the bogie contract, and that since the discharge of the Leonardi brothers, Nare and Bartoli, the department has functioned and continues to function with only two men.

General counsel must prove that the employer committed unfair labor practices, and the mere fact that of a discharge creates no presumption of violation and an unlaw-

ful purpose is not likely to be inferred. *Bituminous Material and Supply Co.* v. *N.L.R.B.*, 281 F.2d 365, 367 (8 Cir. 1960).

It is submitted that the evidence is not substantial and clearly does not preponderate that the complaining employees' lay-offs and/or discharges were related to union activities or protected activities.

POINT III

The Administrative Law Judge improperly precluded certain testimony and evidence which petitioners attempted to elicit from certain of the complaining witnesses, which preclusion of testimony materially prejudiced petitioners' defense.

During the cross-examination of witness Earl Nare, counsel for respondents (petitioners herein) asked Mr. Nare a question, the answer to which was precluded by the administrative law judge, as follows (E.T. 56):

> "Q. Mr. Nare, have you made application for unemployment benefits?
>
> Ms. Kave: Objection.
>
> Judge Lipton: I will sustain it. These are matters—I don't know whether you are familiar with this, Mr. Donelan, these are reserved for specific back pay proceedings. They are not litigated in these proceedings.
>
> Mr. Donelan: I have no further questions."

During the cross-examination of Mr. Bartoli, counsel for the respondents (petitioners herein) again asked a similar question which was again precluded by the administrative law judge, as follows (E.T. 76-78):

> "Q. Mr. Bartoli, did you complete an application for unemployment benefits?

Ms. Kave: Objection.

Judge Lipton: Sustained. Don't persist. You have had a ruling.

Mr. Donelan: Your Honor, I'm not getting into the area whether or not benefits were collected. I am merely trying to get on the record what reasons were given by the charging witnesses as to why they were seeking unemployment benefits which is a very direct development to their state of mind at the time.

Judge Lipton: Do you have copies of their application?

Mr. Donelan: No, I do have a letter we solicited from the New York State Unemployment Insurance Dept.

Judge Lipton: Do you have copies of their application?

Mr. Donelan: No, Sir, I do not.

Judge Lipton: Do you have a transcript of anything?

Mr. Donelan: A transcript? I have a letter.

Judge Lipton: Do you have a transcript of anything they testified to for unemployment insurance?

Mr. Donelan: No, Sir, I do not.

Judge Lipton: You are merely engaging in an exploratory course of questioning on this?

Mr. Donelan: Your Honor, I have a letter from unemployment which quotes from their applications.

Judge Lipton: That is pure hearsay. This witness doesn't know the letter.

Mr. Donelan: Then perhaps—

Judge Lipton: I sustain the objection.

Mr. Donelan: Your Honor, may I be permitted to ask the witness directly the reasons if any, given for—

Judge Lipton: For what?

Mr. Donelan: For applying for unemployment insurance.

Judge Lipton: No, you may not. I sustain the objection.

Mr. Donelan: I have no further questions."

(E.T. 76 to 78).

During the cross examination of Mr. Louis Leonardi, counsel for respondents (petitioners herein) again asked a question which was again precluded by the administrative law judge, as follows (E.T. 104-105):

"Q. Mr. Leonardi, did you ever have any discussions with anyone from the New York State Unemployment—

Ms. Kave: Objection.

Q. (continuing) as to—

Judge Lipton: Please do not persist in this. You already had a ruling. If you have particular evidence indicating testimony, official documents, I will rule at that time on admissibility , but I will not permit you to go on fishing expedition.

Mr. Donelan: I have no further questions."

As will clearly be seen, the specific reason why counsel for respondents (petitioners herein) was asking questions concerning the claiming witnesses applications for unemployment insurance was stated to the administrative law judge in the colloquy following asking the question of George Bartoli (E.T. 76-78). Counsel merely sought to question each witness concerning the reason he gave for seeking unemployment benefits. Such questions were perfectly proper and admissible and sought absolutely no information concerning amounts of any such insurance, nor did they bear any relation whatsoever to specific back pay proceedings.

Moreover, there was absolutely no way of knowing of whether or not counsel would be required to take further

steps with regard to producing or subpoenaing records, transcripts or other documents, until the witnes answered the question; and even then, depending upon the answer of the witness, the further producing or subpoenaing of records, transcripts or documents may not have been necessary.

Section 537 of Article 18 of the New York State Labor Law, dealing with unemployment insurance, provides, in material part, as follows:

> "Section 537. Disclosures prohibited.
>
> 1. Use of information. Information acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law. Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

A similar situation was before the court in *Conigliaro* v. *New Hampshire Fire Insurance Co.*, 8 Misc. 2d 164, 171 N.Y.S.2d 731 (Sup.Ct., Spec.Term, Kings County, 1956) where two subpoenas, one addressed to an Assistant Attorney General of the State of New York and the other a subpoena duces tecum addressed to the Attorney General of the State of New York, were sought to be vacated on motion. The subpoena addressed to the Assistant Attorney General required his presence to give testimony at the trial, whereas the subpoena duces tecum required the Attorney General to appear and produce certain records relating to unemployment insurance taxes of the plaintiff's assignor.

In refusing to vacate the subpoena addressed to the Assistant Attorney General, the Court held (171 NYS 2d at 733):

> "It cannot be determined at this time what testimony the party who subpoenaed (the Assistant Attorney General) will seek to elicit from him. It may be that none of the questions put to him will call for the disclosure of such information as is prohibited by § 537 of the Labor Law. On the other hand, questions put to him may be within the purview of that Section. The trial Court is the proper tribunal to determine, as each question is put to (the witness), whether the statute may be invoked."

Clearly, the administrative law judge improperly precluded the witnesses from testifying in answer to counsel's questions, not only for the wrong reason (i.e., that "these matters—are reserved for specific back pay proceedings . . ."), but because the specific information sought in the qustions was not within the prohibition raised by Section 537 of the Labor Law.

The information sought to be elicited from the witnesses at the hearing was clearly distinguishable from the kind of information which was held to be within the prohibition raised by Section 537 in such cases as *Simpson* v. *Oil Transfer Corporation,* 75 F.Sup. 819 (N) D.C.,N.D.,N.Y. 1948); *Coyne* v. *O'Connor,* 121 N.Y.S. 2d 100 (Sup. Ct.Spec. Term Nassau County, 1953); and *Graham* v. *Seaway Radio Inc.,* 216 N.Y.S. 2d 52 (Sup.Ct. Jefferson County, 1961). In those cases, the discharged employee, who had applied to the New York Labor Dept. for unemployment insurance benefits, sought the production of details and information requested by the unemployment department from the former employer concerning the reasons for the employee's discharge and the employer, under compulsion of law, made such report to the department.

Clearly, the witnesses in the instant matter were under no compulsion to apply for unemployment insurance. But certainly statements made by them, uncommunicated to the employer, in making such application concerning the reasons for their discharge and/or lay-offs which might constitute prior inconsistent statements in view of later charges brought against that same employer, would not fall within the prohibition of Section 537. And clearly, counsel could have no way of knowing whether further actions, such as filing and impleader cause of action against the Industrial Commissioner and/or issuing subpoenas in this respect, would be necessary or unnecesary until the witness answered the questions. *Conigliaro* v. *New Hampshire Fire Insurance Co., supra.*

Accordingly, it is submitted that petitioners' defense against the claims involved herein was materially prejudiced by the administrative law judge's improper and erroneous preclusion of testimony sought to be elicited from witnesses, Nare, Bartoli and Louis Leonardi as well as, in view of the administrative law judge's admonitions, the other claiming witnesses involved herein, and it is respectfully submitted that the order of the Board so affirming the Order and Decision of the administrative law judge should be set aside in its entirety.

CONCLUSION

Accordingly, the Decision and Order of the Board dated November 7, 1974, affirming the Decision and Order of the Administrative Law Judge dated June 14, 1974, should be set aside in its entirety.

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Certificate of Service

IT IS HEREBY CERTIFIED that a true copy of the foregoing brief of petitioner, a copy of the appendix and a copy of the separate exhibit volume was mailed to the National Labor Relations Board, Office of the General Counsel, Attention Elliott Moore, Esq. and Michael J. Messitte, Esq., Washington, D.C., 20570, the 1st Day of April, 1975.

HYNES & DIAMOND

By: Robert J. Gogick
ROBERT J. GOGICK